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JUN 9 1953
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IN THE

Supreme Court of the United States.

No. 687

JULIUS ROSENBERG and ETHEL ROSENBERG,

Petitioners,

against

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING

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AUTHORITIES

Federal Rules of Criminal Procedure:
Rule 33 6
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The petitioners, JULIUS ROSENBERG and ETHEL ROSENBERG, pray for a rehearing and reversal of the order of this Court, entered on May 25, 1953, denying their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

This petition for rehearing is made, pursuant to the provisions of Rule 33 of the rules of this Court, upon the ground of intervening circumstances of substantial and controlling effect.

Reasons Why a Rehearing Should Be Granted and a Writ of Certiorari Issued

The word "shocking" has been used, advisedly, by the petitioners, time and time again in the course of the judicial proceedings in this case. This strong word is hardly adequate to depict the immorality and indecency, befouling the administration of federal criminal justice, of the series of outrages perpetrated by the prosecuting authorities on

the courts, in this case. If the judgments of conviction of the petitioners are upheld, and their execution, thereunder, carried out, the petitioners will die, leaving history to ponder the justice of death sentences responsive to a verdict procured by prosecution conduct, which a reviewing court held could not be "too severely condemned", so "wholly reprehensible," and productive of prejudice to the petitioners so beyond recall that "a new trial * * * should have been granted" (R. 334).

I

Since the filing of the petition for a writ of certiorari herein, new circumstances, affecting one of the contentions made by the petitioners, have come to light, which should have a substantial and controlling effect in the disposition of this case. From these intervening circumstances emerges a question affecting the fair and proper administration of justice, so serious, it is submitted, as to oblige this Court, guardian of fair-play in the federal judicial system, to intervene to protect the honor and reputation of that system, and the very lives of the petitioners from forfeiture to the amorality of conviction-collecting prosecutors.

The petitioners, in their application, herein, under Section 2255 of Title 28 U. S. C., asserted facts to show that the indictment for perjury of a third person, one, William Perl (for denying his knowledge of the petitioners and others allegedly associated with them), was deliberately timed to be returned during the trial of the petitioners, with the obvious intention of prejudicing their right to a fair trial (R. 69-77). The facts relied on were:

(a) The perjury was charged to have been committed some six or seven months prior to the return of the indictment (R. 70);

(2) Some two years after (at the time of the institution of the instant proceeding) his indictment on March 13, 1950, Perl had not yet been brought to trial (and he was not until May 18, 1953), and although he pressed repeatedly for an immediate trial, he had been insistently and successfully opposed by the Government (R. 75-77); and

(3) The Government was in possession of evidence of Perl's perjury, if the charges against him were at all well taken, at or about the time Perl allegedly perjured himself, some six or seven months prior to his indictment (R. 154-55).

The Government sought to rebut the petitioners' assertion of "timing" by submitting opposition affidavits, which stated facts to show, as Judge Sylvester J. Ryan stated in his opinion herein in the District Court "that it was not until March 6, 1951 [about one week before the Perl indictment, and the day when the petitioners' trial first began] that he [the United States Attorney] came into possession of evidence sufficient in law to sustain Perl's indictment for perjury" (R. 14).

The affidavit of Myles J. Lane, the then United States Attorney for the Southern District of New York, stated:

> "The Perl indictment was obtained within a week after Perl had admitted he had not been truthful to the Grand Jury" (R. 137).

The affidavit of John M. Foley, and Assistant United States Attorney for the said District, stated:

> "On March 6, 1951, at approximately 6:15 P. M., William Perl, in the presence of his attorney Mr. Raymond Wise, and in the presence of several Assistant United States Attorneys and two Special Agents of the Federal Bureau of Investigation stated that he had lied to the Federal Bureau of Investigation and the Grand Jury in that he had minimized his associations with Morton Sobell and other persons. A true bill was voted and the indictment handed down within a week of this admission" (R. 143).

These affidavits were, expressly, the foundation for the conclusion reached by the District Court, that only on March 6, 1951 did the United States Attorney come into possession of sufficient evidence to warrant the indictment of Perl. Referring to these affidavits, that court ruled: "This satisfactorily explains why Perl was not indicted until March 15, 1951 for perjury alleged to have been committed on August 18, 1950 and September 11, 1950" (R. 14).

William Perl was, at long last, brought to trial on May 18, 1953, after the filing of the petition for certiorari herein and before its determination by this Court, in the United States District Court for the Southern District of New York on the four-count perjury indictment returned on March 13, 1951. [*United States* v. *Perl*, Crim. No. 135-43.] On May 22, 1953, the jury brought in a verdict of guilty on two counts, with a recommendation for leniency. On June 5, 1953, he was sentenced to 5 years imprisonment (the maximum) on each count, to run concurrently.

The testimony adduced at the Perl trial reveals that the affidavits of United States Attorneys Lane and Foley, upon which the District Court's opinion turns, were false and misleading affidavits, which either were designed to, or, in any event, had the effect of cloaking the misconduct of the prosecutor from the court and, in the process, frustrating the petitioners' claim to relief.

This conclusion is an inescapable inference from the following facts:

(1) The Government, in the Perl case, did not introduce into evidence, on its direct case against Perl, the admission of guilt he allegedly made as attested to in the affidavits of Lane and Foley (or any other admission), and without which, these affidavits stated, in essence, the Government had insufficient evidence to warrant an indictment. It is reasonable to assume, that had such an admission been made, in the presence of such "worthy" witnesses, its intro-

duction at the trial, particularly in the posture of the evidence in that case, would seem to have been axiomatic.

(2) Perl, testifying in his own defense, denied that on March 6, 1951 (or at any other time), he had made admissions, ascribed to him in the affidavits of Lane and Foley (*United States* v. *Perl*, steno minutes, pp. 455-460, annexed hereto and marked "Exhibit A".)

(3) Despite Perl's denial, the Government refrained from calling a single witness to rebut his denial, although, it must be presumed, that there was available to the Government, voluntarily or by subpoena, each of the witnesses present at the conference at which the alleged admission was made.

(4) The Government relied, to prove its case, exclusively on evidence of which it had knowledge at or about the time of the commission of the alleged perjury by Perl, some six or seven months prior thereto.

From these facts it is impossible to reach a conclusion other than that Perl never made an admission of guilt either on March 6, 1951, or at any other time, and that the affidavits of Lane and Foley to the contrary are without foundation in fact. Thus, in the very proceeding in which the petitioners charged the prosecution with misconduct, the prosecution, in a frenetic effort to conceal, grossly compounded its unconscionable conduct by introducing false affidavits by the miscreant prosecutors, in this new proceeding, which were obviously successful in misleading the court.

This Court has said in *McNabb* v. *United States*, 318 U. S. 332, 340 (1943):

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic

safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

Is trial by *fraud* any more consonant with "civilized standards of procedure and evidence"?

It would be difficult to imagine, under the circumstances, a more compelling situation to move this Court to exert its supervisory powers over the administration of criminal justice in the federal courts.

The refusal of review by this Court of this aggravated fraud—together with a refusal to review a decision of affirmance where the appeals court characterized the prosecutor's conduct as to be "severely condemned", "wholly reprehensible" and so prejudicial that a "new trial * * * should have been granted"—might be construed by the unscrupulous to mean that "anything goes." This Court, under our constitutional scheme of liberties, has always properly proceeded on the assumption that if, in one case, "anything goes", the liberties of all Americans, on such a precedent, are endangered.

It is respectfully submitted, therefore, that this Court should accept review of this case, reverse its order denying the writ of certiorari herein and let the writ issue.

II

The instant application under 28 U. S. C. § 2255 was based in part on the claim that the Government knowingly used perjured testimony of David Greenglass, its witness-in-chief, to procure the conviction of the petitioners. On June 6, 1953, the petitioners, on the basis of evidence, newly discovered in major part since the filing of the petition for certiorari herein, of perjury on the part of Greenglass and his wife, Ruth, filed a new petition for a re-trial, under Rule 33 of the Federal Rules of Criminal Procedure,

and for a vacation of the judgments of conviction against them under 28 U. S. C. § 2255.

This new petition is based on proof positive, short of recantations by the Greenglasses—the one, imprisoned, under the aegis of the Government; the other, free, under the Damoclean sword of possible indictment for her admitted crime which carries a death sentence—that a case was constructed against the petitioners on a pyramid of lies.

Demonstrative evidence (the missing console table) is brought to light, which belies the trial testimony of the Greenglasses on an important issue. Documents establish that the Greenglass pre-trial story to the authorities, heretofore unavailable to the petitioners, excluding from involvment, as it did, at critical points, the petitioners and the atom-bomb, was a very different tale from his trial testimony—as different as "Hamlet" without Hamlet. Documents establish the motivating force for the Greenglasses' trial testimony to be a deal: the Greenglasses' lives for their inculpation of the petitioners; a deal, concealed at the trial by the Greenglasses' false denial of its existence; a deal so shabby that, in a case where these petitioners were punished by death, it was first conceived that *neither* of the Greenglasses should even be named as a defendant; and then, that David Greenglass, but not Ruth, was to be made a co-defendant, who would receive only a suspended sentence; and finally, only after suggestions in open court by counsel for the petitioners at their arraignment, that a deal might be in the making, the Government indicated to the Greenglasses that, as a face-saving device, David Greenglass might well be required to serve some prison term. Facts, on the face of the record, demonstrate that, at least as to Ruth Greenglass, the deal was fulfilled; as to David Greenglass, the Government's sentencing recommendation indicates that its power was asserted to effect a mitigation of his punishment.

The petitioners submit that the claims of knowing use of perjured testimony made in the instant application, viewed in the context of the newly discovered evidence, take on the greater significance, which is due them. It is, therefore, respectfully suggested, in the alternative: (a) that this Court's disposition of the instant application await the determination of the merits of the new application by the lower courts; or (b) that the instant application be remanded by this Court for reconsideration by the lower courts together with and in the context of the claims made in the new application referred to above.

The petitioners recognize that the new application for relief and the papers on which it is based are not officially before this Court and that, therefore, there is question as to whether the references to the record in the new application are properly made. However, in the light of the exceptional circumstances and the exigencies of the situation, as the execution date of the petitioners has been officially fixed for June 18, 1953, the petitioners, upon this Court's request, stand ready to submit to this Court the moving papers on the new application so that this Court may evaluate the assertions regarding them made herein, in terms of the suggestions for disposition made above.

CONCLUSION

The relief herein requested should be granted.

Respectfully submitted,

EMANUEL H. BLOCH,
JOHN F. FINERTY,
Counsel for the Petitioners.

Certificate

The undersigned, EMANUEL H. BLOCH, counsel for Julius Rosenberg and Ethel Rosenberg, hereby certifies that this petition is presented in good faith, and not for delay, and that it is restricted to grounds specified in Rule 33(2) of the Rules of this Court.

EMANUEL H. BLOCH

EXHIBIT A

* * * * * *

Q. Well, now, Mr. Perl—and I am getting near the end of my redirect examination—do you recall a rather large meeting down in this building around the beginning of March, 1950, at which there were present a number of people including yourself, Mr. Myles Lane, and Mr. Foley, an assistant United States attorney, and I think maybe Mr. Cochran, and possibly—I am not too sure of this—Mr. Kilsheimer, another assistant United States attorney, and Mr. Roy Cohn. A. Yes, I recall that.

Q. Do you recall it very vividly? A. Parts of it I do, yes.

Q. Now, at that meeting were you given a chance to change your Grand Jury testimony?

The Court: It calls for a conclusion on the part of the witness.

Mr. Wise: I will withdraw the question.

The Court: Yes.

When was this meeting, now, that you refer to?

The Witness: This was shortly before my indictment, several weeks before.

The Court: That was in March, 1951?

The Witness: Either February or March of 1951.

The Court: After you had testified before the Grand Jury and before your indictment?

The Witness: Correct.

The Court: Before the indictment was returned; is that correct?

The Witness: That's right.

Q. Well, let's get the days in sequence because they are important. You appeared first before the Grand Jury on August 18, 1950; is that correct? A. Yes.

Q. And again on September 11, 1950? A. Yes.

Q. And again on October 4, 1950? A. Yes.

Q. And did you ever appear before the Grand Jury after October 4, 1950? A. No.

Q. Now, this meeting was in March, 1950, according to my recollection, but I will take yours. Do you remember now on the stand when it was?

Mr. Martin: Your Honor, I object to that form of question.

The Court: Yes. Don't put yourself into it, counselor.

Mr. Wise: I withdraw the question. You are both right.

The Court: Excuse me. What did you say?

Mr. Wise: I withdraw the question. You are both right. The objection is well taken and——

The Court: I thank you very much for acquiescing in my ruling, but it is my responsibility, counsel, and don't pass remarks like that.

Mr. Wise: I'm sorry. I didn't mean it that way.

The Court: Now, this meeting that you were questioned about was in 1951?

The Witness: Yes, February or March of 1951, to the best of my recollection.

The Court: Was your counsel present at that meeting?

The Witness: I am not sure whether there was more than one there. He was present at one such meeting, and I believe that is what you are referring to.

Q. Well, don't you remember whether or not I was present at both meetings? A. No.

Q. Well, you are not trying to imply that this group of assistant United States attorneys and agents would have you down there alone at that time, are you?

Mr. Martin: I object to that, your Honor.

The Court: Objection sustained.

Q. Well, do you remember what was said to you by anybody at that meeting? A. Specifically, no.

Q. Well, in substance, do you remember what was said? A. Yes, I remember some general remarks by—well various FBI agents but mainly Mr. Roy Cohn informed me that—well, that if I did not confess I would be indicted.

Q. Did he say that he did not want to indict you? A. I don't recall. That was the main substance of what he told me.

Q. Well, did he say that you are a Columbia instructor and that he is reluctant to indict you? A. I don't recall that. I don't think that it was along those lines. I think it was, if you ask me to characterize it briefly——

The Court: Well, don't characterize it. Just tell us in substance what he said to you.

The Witness: Well, that was the substance of what it was.

Q. And you were given an opportunity at that meeting to make a further statement; is that correct? A. Oh, yes.

Q. And what did you say? A. Well, something to the effect that I had nothing to confess, but whatever he or anybody had against me, I would very much like to hear in open court.

Q. Did you go out in the hall and withdraw from the meeting and confer with me? A. I don't recall that specifically, but I might very well have done it.

Q. And then you might equally well have returned to the meeting with me after you conferred with me; is that correct? A. Yes, I guess I might have. Sure.

Q. Well, this is important, and I would like you to search your memory. Would it be fair to tell this Court and jury——

The Court: Counsel, why don't you let this witness testify rather than lead him in the manner in which you have been?

Q. I ask you, can you tell us now whether you had the benefit of legal advice before you answered Mr. Roy Cohn at that meeting? A. With respect to what Mr. Cohn was going to tell me or what was telling me?

Q. What he had already told you. A. Well, I was in conference with you, but nothing that you or anybody else could have told me would have had any effect on my answer to Mr. Cohn.

Mr. Wise: Will you bear with me a moment, your Honor?

The Court: Yes, surely.

Mr. Wise: You may recross examine.

Recross examination by Mr. MacMahon.

Q. In other words, Mr. Perl, in March of 1950 you were given another chance to tell the truth?

Mr. Wise: '51.

Mr. MacMahon: Yes.

Q. In March of 1951 you were given another chance to tell the truth and you still lied?

Mr. Wise: That is objected to as to form, your Honor.

The Court: Yes. Objection sustained.

Mr. MacMahon: No further questions, your Honor.

Mr. Wise: No further questions, Mr. Perl.

The Court: You may leave the stand.

(Witness excused.)

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